

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
VONAGE HOLDINGS)	
CORPORATION)	WC Docket No. 03-211
)	
Petition for Declaratory Ruling)	
Concerning an Order of the Minnesota)	
Public Utilities Commission)	
_____)	

COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

Through the undersigned and pursuant to Section Rules 1.415 and 1.419,¹ of the rules of the Federal Communications Commission (FCC), the United States Telecom Association (USTA)² hereby submits comments in WC Docket No. 03-211 regarding the Petition for Declaratory Ruling filed by Vonage Holdings Corporation (Vonage) on September 22, 2003 (Vonage Petition).³ The Vonage Petition asks the FCC to preempt an order of the Minnesota Public Utilities Commission (Minnesota PUC) requiring Vonage to comply with state laws governing providers of telephone service. The Minnesota PUC sought to impose common carrier regulation on the intrastate use of Vonage's service on the theory that the service was functionally the same as a telephone service. Vonage argued that it is a provider of information services rather than a

¹ 47 C.F.R. §§ 1.415 and 1.419.

² USTA is the nation's oldest trade organization for the local exchange carrier industry. USTA's carrier members provide a full array of voice, data, and video services over wireline and wireless networks.

³ *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Petition for Declaratory Ruling, WC Docket No. 03-211 (filed Sept. 22, 2003).

telecommunications carrier or common carrier subject to Title II of the Communications Act of 1934, as amended (Act). In addition, the Minnesota PUC ordered Vonage to comply with the same rules as local exchange carriers regarding 911 emergency services (E911). Vonage asked the FCC to find that certain E911 requirements imposed by the Minnesota PUC conflict with federal policies. Finally, Vonage argued that preemption was necessary because of the impossibility of separating the Internet into intrastate and interstate components.

USTA opposes determinative action by the FCC on the Vonage Petition at this time. USTA believes that it is impossible for the FCC to deal with Voice over Internet protocol (VoIP) issues via piecemeal petitions for declaratory ruling. As USTA has previously argued in VoIP proceedings,⁴ before the FCC takes any action to define the regulatory classification of a particular provider's offerings, it must complete pending rulemaking proceedings concerning the appropriate regulatory classification for services and facilities used to provide broadband access to the Internet and affirm, reject, or modify the tentative conclusions reached in its 1998 *Report to Congress*.⁵ The Vonage Petition should be dismissed without prejudice, and the FCC should turn toward the task of resolving fundamental questions regarding the regulatory classification of broadband and VoIP services and the impact of classification on universal service support, public

⁴ See *Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, USTA Comments, WC Docket No. 03-45 (March 14, 2003); *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, USTA Reply Comments, WC Docket No. 03-45 (April 2, 2003).

⁵ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (1998) (*Report to Congress*).

safety mechanisms, customer protections, and other dockets. In addition, the FCC should institute a separate rulemaking on VoIP services.

DISCUSSION

USTA urges the FCC to dismiss the Vonage Petition for two main reasons. First, dismissal would not adversely affect Vonage. Vonage sought a narrow measure of relief,⁶ and the relief it requested was granted by the decision of a U.S. District Judge in Minneapolis, Minnesota on October 16, 2003.⁷ The judge ruled that Internet voice service between computers or between computers and telephones could not be regulated by the states. The judge classified Vonage's offering as an information service and concluded that the Minnesota PUC's ruling had been preempted by Congress in its protection of nascent Internet activity. Therefore, there is no urgency for an FCC decision on the Vonage Petition because Vonage has received the relief it requested. Second, and more importantly, other petitions seeking declaratory rulings regarding VoIP services are pending before the FCC.⁸ All of these petitions potentially have an impact on universal service, E911, CALEA, and other dockets. Because of the broad range of issues that must be considered in connection with VoIP classification, USTA urges the FCC to reach final conclusions regarding the regulatory classification of various VoIP configurations and architectures addressed in the *Report to Congress* and complete

⁶ Vonage Petition at 3.

⁷ Trager, Louis, *Vonage VoIP Ruled Information Service, Preempting State Regulation*, COMMUNICATIONS DAILY, Oct. 17, 2003.

⁸ *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, Petition for Declaratory Ruling, WC Docket No. 03-45 (filed Feb. 5, 2003) (Pulver Petition); *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access*

pending rulemakings concerning the appropriate regulatory classification for broadband access to the Internet before ruling on the Vonage Petition and others like it.

Furthermore, USTA urges the FCC to begin a separate rulemaking proceeding on VoIP. The Chairman of the FCC is said to be leaning toward proposing a notice of inquiry on VoIP, which would involve a long, three-step process that could take several years to complete, rather than a notice of proposed rulemaking, which is a pending regulatory decision resolved with relatively quick action.⁹ VoIP service is a rapidly expanding service that is quickly becoming a strong competitor to traditional voice service. The regulatory issues raised by this rapidly expanding service must be addressed sooner rather than later. The regulatory lag that would occur if the FCC were to issue a notice of inquiry on VoIP rather than a notice of proposed rulemaking could have dramatic – even disastrous – consequences for the future of universal service, consumer safety, and regulatory parity. Therefore, USTA urges the FCC to propose a rulemaking proceeding as soon as possible.

The *Report to Congress* focused on the potential effects of the Internet and Internet use on the public switched telephone network. The *Report to Congress* addressed the question of whether VoIP should contribute to universal service support programs pursuant to Section 254 of the Act.¹⁰ The FCC examined the VoIP offerings available at the time and discussed tentative regulatory classifications of these offerings. AT&T cites the analysis used by the FCC in the *Report to Congress* as support for the

Charges, Petition for Declaratory Ruling, WC Docket 02-361 (filed Oct. 18, 2002) (AT&T Petition).

⁹ Buskirk, Howard, *Powell Promises Inquiry as VoIP Regulation Moves to Front Burner*, TELECOMMUNICATIONS REPORTS (Oct. 15, 2003).

AT&T Petition.¹¹ Pulver.com cites the analysis used by the FCC as support for the Pulver Petition.¹² Vonage cites the report as support for the Vonage Petition.¹³ Each of these petitioners relies on an analysis that was conducted over five years ago. Rapid changes in technology and the introduction of revolutionary new services have occurred in those five years. Voice communications capabilities not yet invented in 1998 are now available. The FCC, itself, recognized that new Internet-based services were emerging and that its application of statutory terms to new technological developments was tentative, stating, “We do not believe, however, that it is appropriate to make any definitive pronouncements [on the legal status of VoIP services] in the absence of a more complete record focused on individual service offerings.”¹⁴ Therefore, before the FCC can act on the Vonage Petition, it must update the record to take into account changes in technology that have occurred over the past five years, finalize its conclusions in the *Report to Congress*, and complete pending rulemaking proceedings concerning the appropriate regulatory classification for services and facilities used to provide broadband access to the Internet. It must also address how it will ensure the continuation of universal service support in light of its final conclusions regarding regulatory classifications.

Viewed together, the AT&T Petition, the Pulver Petition, and the Vonage Petition illustrate the difficulty of arriving at a definition of Internet Protocol (IP) telephony or VoIP to which a common classification can be attached. The services that AT&T,

¹⁰ 47 U.S.C. § 254(b)(4).

¹¹ AT&T Petition at 26-28.

¹² Pulver Petition at 4.

¹³ Vonage Petition at 15-16.

Pulver, and Vonage provide and define as IP telephony in their petitions are vastly different. Pulver facilitates point-to-point broadband IP telephony, which it argues is neither “telecommunications,” a “telecommunications service,” nor an “information service,” as those terms are defined in the Act.¹⁵ AT&T provides phone-to-phone IP telephony, which it argues should be exempt from access charges.¹⁶ Vonage provides computer-to-computer and computer-to-phone IP telephony, which it views as an information service.¹⁷ These different definitions of VoIP make clear that the VoIP or IP telephony label alone is not sufficient to determine the regulatory classification of an offering. A fully developed framework for analyzing communications offerings over the Internet, consistent with the applicable provisions of the Act, is critical.

In addition to building such a framework, the FCC must adhere to its mandate to preserve universal service support. Allowing new service providers an unwarranted exemption from contributing to universal service support is not in the public interest and is contrary to Section 254 of the Act, which requires equitable and nondiscriminatory contributions by all providers of telecommunications services in order to ensure that there are specific, predictable, and sufficient mechanisms to preserve and advance universal service.¹⁸ As broadband-based communications offerings increase, maintaining universal

¹⁴ *Report to Congress* at ¶ 83.

¹⁵ Pulver Petition at 6 and note 9.

¹⁶ AT&T Petition at 14 and 26-27. USTA opposed the AT&T Petition, in which AT&T asked the FCC to exempt AT&T from paying interstate access charges for its interstate circuit-switched services that employ IP but still use the PSTN for the origination or termination of those services.

¹⁷ Vonage Petition at 16.

¹⁸ 47 U.S.C. §§254(b)(4) and 254(b)(5).

service support will require that support be collected from a broader base of service providers in a competitively-neutral manner.

CONCLUSION

As it evaluates new offerings, the FCC should remain sensitive to balancing the preservation of universal service and concerns raised in other dockets against the encouragement of Internet innovation, investment, and growth. For this reason, and for the reasons above, USTA urges the FCC to dismiss without prejudice the Vonage Petition – which was rendered moot when the Minnesota district court granted Vonage the relief it requested – and to complete pending rulemakings on broadband and institute a separate rulemaking on VoIP as soon as possible.

Respectfully Submitted,

UNITED STATES TELECOM ASSOCIATION



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CERTIFICATE OF SERVICE

I, Meena Joshi, do certify that on October 27, 2003, the aforementioned Comments of The United States Telecom Association were electronically mailed to the following:

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